

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

75-1183

B
pgs

To be argued by
JOHN PATTEN

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

VS.

SUEY WING NG,

Defendant-Appellant.

*On Appeal from the United States District Court for the
Southern District of New York*

BRIEF FOR DEFENDANT-APPELLANT

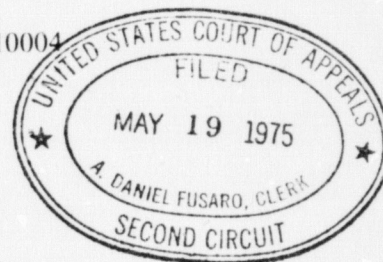
PERROTTA & PATTEN

Attorneys for Defendant-Appellant

80 Broad Street

New York, New York 10004

(212) 944-4500



(8358)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J.
(201) 257-6850

New York, N.Y.
(212) 563-2121

Philadelphia, Pa.
(215) 563-5587

Washington, D.C.
(201) 783-7288

TABLE OF CONTENTS

	PAGE
I. Table of Cases, Statutes and Other Authorities Cited	iii
II. Issues and Questions Involved	1
III. Index to Brief	2
A. Preliminary Statement	2
B. Evidence at Trial	3
(1) Government's Case Following Witnesses Testified for Government	3
(a) Lam Kin Sang	3
(b) Danny Or	8
(c) John Toal	14
(d) Kock Men Hom	15
(e) Raphael Julian Rodriquez	16
(2) Defense Testimony of Suey Wing Ng	18
C. Argument	21
Point I -- Government's failure to give the defendant notice of the introduction of crimes not charged in the indictment under the circumstances of the case, surprised the defendant and prejudiced him to the extent that there was a violation of due process and a denial of a fair trial.	21
Point II -- The appellant's right to a fair trial was prejudiced by the allowance of proof of prior acts attributed to the appellant, such acts or crimes not being charged in the indictment.	31

Point III -- The defendant's right to a fair trial was substantially prejudiced by the improper conduct of the government's attorney throughout the trial.

38

Conclusion

44

TABLE OF CASES, STATUTES AND OTHER
AUTHORITIES CITED.

	PAGE
Sixth Amendment of United States Constitution	28
14th Amendment of United States Constitution	29
<u>Berger vs. U.S.</u> , 295 U.S. 78 (1935)	29, 38
<u>Dunn vs. U.S.</u> , 307 F.2d 883 (5 Cir. 1962)	39
<u>Hallman vs. U.S.</u> , 208 F.2d 825, 827 (D.C. Cir 1953)	29
<u>Handford vs. U.S.</u> , 249 F.2d 295, 296 (5 Cir. 1957)	38
<u>People of the State of New York (New York Court of Appeals) vs. Fiore</u> , 34 N.Y.2d (1974)	36
<u>United States v. Adams</u> , 385 F.2d 548, 551 (2 Cir. 1967)	27
<u>United States v. Bozza</u> , 365 F.2d 206, 213 (2 Cir. 1966)	31, 35
<u>United States v. Brevard</u> , 27 F.R.D. 250 (S.D.N.Y. 1961)	26
<u>United States v. Byrd</u> , 352 F.2d 575 (2 Cir. 1965)	27
<u>U.S. v. Cavallino</u> , 498 F.2d 1200 (C.A. Fla 1974)	32
<u>U.S. v. Cruikshank</u> , 92 U.S. 542 (1875)	29
<u>U.S. v. Deaton</u> , 381 F.2d 114, 117 (2 Cir. 1967)	31, 35
<u>U.S. v. Farinas</u> , 299 F.Supp 852 (S.D.N.Y. 1969)	29
<u>U.S. v. Hess</u> , 124 U.S. 483	29
<u>U.S. v. Holt</u> , 108 F.2d 365 (7 Cir. 1939)	39

	PAGE
<u>U.S. v. Jones</u> , 476 F.2d 533, 537 (D.C. Cir. 1973)	27
<u>U.S. v. Lebron</u> , 225 F.2d 531, 535-36 (2 Cir. cert. denied 350 U.S. 876 (1958))	25, 26
<u>U.S. v. Lieberman</u> , 15 F.R.D. 278 (S.D.N.Y. 1953)	26
<u>U.S. v. McClain</u> , 440 F.2d 241 (C.A.D.C. 1971)	37
<u>U.S. v. Mooney</u> , 417 F.2d 936 (8 Cir. 1969)	29
<u>U.S. v. Russell</u> , 369 U.S. 749 (1969)	28
Rule 7 (c) of the Federal Rules of Criminal Procedures	28
Rule 52 of the Federal Rules of Criminal Procedures	29
McCormick Evidence Sec. 157 (1954)	32
Standards for Discovery and Procedure before Trial	
American Bar Association Tentative Draft - May, 1969, p. 31	25

THE ISSUES AND QUESTIONS INVOLVED

- A. Government's failure to give the defendant notice of the introduction of crimes not charged in the indictment, under the circumstances of the case, surprised the defendant and prejudiced him to the extent that there was a violation of due process and a denial of a fair trial.
- B. Was the appellant's right to a fair trial prejudiced by the allowance of proof of prior acts attributed to the appellant, such acts or crimes not being charged in the indictment.
- C. The defendant's right to a fair trial was substantially prejudiced by the improper conduct of the government's attorney throughout the trial.

UNITED STATES COURT OF APPEALS
For the Second Circuit

United States of America,
Plaintiff-Appellee,
against
Suey Wing Ng,
Defendant-Appellant.

BRIEF FOR APPELLANT

Suey Wing Ng

Preliminary Statement

The appellant, Suey Wing Ng, appeals from a judgment United States District Court, Southern District Court, Southern District of New York, (Judge Edward Weinfeld and a jury), adjudging the defendant guilty of a conspiracy to violate Sec. 812 (a) (1) and 841 (b) (1) (A) of Title 21, United States Code, the First Count of the Indictment. There was a hung jury as to counts 2 to 7 (substantive counts of possession and sale).

As a consequence of having been found guilty by the jury on the conspiracy count, the appellant was sentenced to a jail term of three years.

The appellant is on bail pending this appeal.

THE EVIDENCE AT TRIAL

THE GOVERNMENT'S CASE AGAINST THE APPELLANT

LAM KIN SANG, AKA LAM PING, AKA CHIS LAM, testified that he was convicted of violating the Federal Narcotics Laws and was serving a 15 year sentence on that conviction. His attorney had made a motion for the reduction of sentence which had been denied; he stated that he intended to renew that motion and that the Government would inform the sentencing judge of his cooperation in testifying against the defendant. He further testified that the Government would likewise inform his parole board of his cooperation.

He testified that he first met the defendant, Ng, in Hong Cong during 1960, he hadn't seen Ng since 1960 until he met him by chance in a New York restaurant sometime during October, 1972. During this meeting he stated that Ng informed him that he had a pound and a half of crystal heroin for which he asked Lam to find a buyer. He stated that Ng gave him the telephone of the Wun Fung Volley Ball Club and that Lam was to contact Ng there.

Lam then contacted the Chan brothers, CHAN YUK SHUI

and CHAN YUK WO. He stated that the Chan brothers informed him that they had found a customer. Within two or three days, the Chan brothers brought him the money, whereupon Lam telephoned the defendant at the Volley Ball Club.

He stated that Ng told him to come to the third floor landing of 179 Canal Street, and at the top of the stairs there would be a package. He and the Chan brothers proceeded to the designated building. One of the Chan brothers entered the building and came out with a paper bag. Lam did not see what was inside the paper bag.

Later that evening, Ng came to the restaurant and collected the money. Lam met the Chan brothers at a subsequent time and inquired of them as to the quality of the heroin and they indicated okay.

Transaction number two took place about two weeks later, the middle of November. Lam met Ng at a gambling club at 83 Bayard Street where Ng told Lam that Ng had a second pound and a half for sale and to locate a buyer (45 a) for the same price.

Lam contacted one, Ah Dau who told Lam to save it

for him and he (Dau) would look for a customer (46 a). Lam stated that he had done business with Ah Dau before and had sold heroin to him in July, 1972, and that the July transaction did not involve the defendant. (47 a)

Lam agreed to sell Dau the pound and a half at a price of \$16,500. Ah Dau delivered the money at which time he (Lam) again telephoned Ng at the Volley Ball Club. He stated that he was again instructed to proceed to the third floor landing of 179 Canal Street to pick up the package. Lam and Dau then proceeded to the Volley Ball Club where Dau entered the building and exited therefrom in possession of a package. Lam testified that he did not know what was inside the package (52 a). Later that evening, Ng came to the gambling club whereupon Lam gave him the money.

As in the first transaction, Lam saw the purchaser Ah Dau later and asked him if the goods were correct and Ah Dau stated yes.

Lam then testified as to a third transaction in December of 1972. Ng informed Lam that he had another pound and a half; and he again asked Lam to find a purchaser. The purchaser on this transaction was again

Ah Dau. Lam stated that Ah Dau again brought the money for this sale to his gambling club and that he (Lam) telephoned the defendant at the Volley Ball Club (58 a). The arrangements were the same; Lam and Ah Dau proceeded to the same address whereupon Ah Dau entered the building and exited therefrom with a package. Lam again testified that he didn't see what was in the package (59 a). Ng then came to the gambling club and picked up the money from Lam. Ng then informed Lam that there was an "extra pound and a half there" (60 a). Lam then contacted Ah Dau and inquired about the extra weight. Dau denied the presence of the extra amount, and that he (Lam) so informed Ng.

Lam testified about a fourth transaction that took place approximately a week later. Ng informed him that he had another pound and a half and that he wanted Lam to look for somebody to buy it (63 a). Lam stated he found an individual by the name of Ja B Lam who agreed to purchase this pound and a half. Lam testified that he again telephoned Ng at the Volley Ball Club and received the same instructions where to make the pick up. Ja B Lam sent one Suey Nom to the same gambling club, and both he and Lam proceeded to

the Volley Ball Club where Suey Nom went upstairs to make the pick up. Again Lam testified, exactly as he did in the other transactions, that Nom exited the building with a package and that he (Lam) did not see what was inside the package. Again Ng came to the gambling house and was given the money by Lam. The witness then repeats the same story that he meets Ja B Lam at a later time at which time Ja B Lam tells him the goods were fine (67 a).

Lam then testified about a fifth transaction where Ng personally gave him another pound and a half (69 a). This time the witness stated he looked inside the bag given to him by the defendant and that he saw a plastic bag containing brown crystals inside. Lam found a buyer by the name of Kam Shui. Upon receiving payment from Kam Shui, Lam then telephoned the defendant at the Volley Ball Club and asked him to pick up the money which he did (73 a).

Lam then testified about a sixth and final transaction. This took place again about one week after the fifth transaction.

Lam testified that Ng had another pound and a half

of heroin for sale. Lam found a buyer by the name of Lee Louie. Lam stated that he had had other dealings with Lee Louie at a prior time (74 a). Lee Louie paid Lam and sent an individual named Fatty Man to pick up the goods. Lam then informed Ng who gave him the heroin the following evening. Lam looked inside the bag and saw cellophane bags inside, each containing coffee colored granules. Lam delivered the package to Lee Louie.

DANNY OR, aka OR CHOIK, aka AH DAU testified that he was an illegal alien and that he was presently serving a 15 years to life sentence as the result of a criminal conviction in New York State Courts for two sales of heroin. In return for his cooperation with the Government, he was promised that his sentencing Judge would be informed of his cooperation with respect to any motion he might make for a reduction of his sentence. His parole board would also be informed of his cooperation when he became eligible for parole.

OR testified that he first met Lam Kin Sang between May and June of 1972 and that he knew Lam by the name of Lam Ping. OR stated that he had a one pound heroin transaction with Lam Ping during the summer of 1972; and

that his next transaction with Lam took place sometime in December of 1972.

Between the summer of 1972 transaction with Lam and December of 1972, OR testified that he made three separate purchases of heroin from a person named Wing Chong.

The first transaction with Wing Chong took place around August, 1972. OR and an individual named Ah Sai drove to the Wing Chong Store on Bayard Street where Ah Sai introduced him to Wing Chong. OR stated that after the introduction, he, Ah Sai and Wing Chong then proceeded to the Better Service Laundry Factory in the Bronx. Wing Chong exited the car and walked toward the factory where he was met by a waiting individual who was holding a package. Wing Chong took the package, returned to the car and gave it to Ah Sai. Danny OR and Ah Sai returned to their apartment leaving Wing Chong in the Bronx. Upon returning to the apartment, they opened the package, which was about one pound in weight, and observed it to contain coffee colored crystals of heroin. (141a-142a) OR stated that they took some out for their own use and sold the remainder for \$12,000. After they received their money, they went to Chinatown and paid Wing Chong about \$7,000.

OR further testified that he and Ah Sai had two more transactions with Wing Chong -- one in September, 1972, and one in October, 1972. He stated that the second transaction was for one pound and the third one was for a pound and a half. (143 a) The second transaction took place in the Bronx at the laundry factory but this time Wing Chong was already there when OR and Ah Suey (sic) arrived. Wing Chong handed the package to Ah Suey (sic); they then left the area and went back to their apartment. Again at the apartment, they divided up the heroin. He testified that this heroin looked the same as the first lot and that they paid Wing Chong the same price by the same procedure.

The third transaction also took place in the Bronx at the laundry factory. When OR and Ah Suey (sic) arrived, Wing Chong was already there waiting with a package. Wing Chong handed the package to Ah Suey (sic) and they again went back to the apartment. (145-146a) The contents looked the same as the first two lots.

OR testified that after this transaction, Ah Suey (sic) was deported. OR then went to Wing Chong and asked him if he had any more heroin, whereupon Wing Chong answered "no" and informed OR that he had not been paid for the

pound and a half. (147 a)

OR had no further direct transactions with Wing Chong. He testified that around the middle of December, 1972, he returned to Lam Kin Sang as his source of heroin. OR agreed to purchase a pound and a half from Lam Kin Sang and stated that he received the money for the purchase from a Puerto Rican named "Baby". OR testified that two males showed up at "Baby's" apartment with the money. A woman showed after a while and that she also handed money to "Baby".

OR and "Baby" counted the money while in the apartment and then proceeded to Lam Kin Sang's gambling club in Chinatown. OR brought the money to Lam Kin while "Baby" waited in the car. Lam Kin accepted the money and told OR to wait for him at the corner of Canal and Mott Street. OR testified that as he left the premises he saw Lam lifting the telephone (154 a).

After a short period, Lam approached and instructed OR to follow him to a building at 179 Canal Street. He then testified that both he and Lam entered the building and that Lam went upstairs, got the package and

handed it to OR. Danny OR then returned to "Baby"; and both proceeded back to "Baby's" apartment.

While at the apartment, the contents of the package was weighed and divided into a one pound package and a half pound package. The one pound, "Baby" gave to the two men and the half pound he gave to the lady. OR has since found out that one of the two men was a government informer and the other was a drug agent (157 a).

In the latter part of December, 1972, the informer asked OR to get two more pounds of heroin. OR again went to Lam and negotiated the sale of a pound and a half. After the conversation with Lam, OR returned to his apartment where he was visited by an individual named Jose who needed a half a pound right away. OR agreed to supply it and Jose handed him the money right then and there.

OR testified that he was trying to get two pounds for the agent and that he had also promised Jose a half a pound. He stated that he was to get a pound and a half from Lam and that he was promised a pound from a person named "Tommy" (161 a). He stated that he and Jose went to Chinatown where he located Lam at the gambling house.

OR gave the money to Lam at the gambling club and was instructed by Lam to wait for him at the corner of Canal and Mott Street, and again as he (OR) was leaving the gambling club, he once again observed Lam lifting the telephone. (162 a)

OR and Lam proceeded to 179 Canal Street whereupon Lam went upstairs, and returned with a package and gave it to OR. OR then returned to the apartment, weighed the contents of the package and discovered it contained three pounds instead of a pound and a half (163 a). OR gave a half a pound from Lam's lot to Jose. He stated that after he gave the half pound to Jose, he put the rest away.

The following evening, the informer and the drug agent arrived at his apartment and delivered to OR the money for the two pounds. OR then stated that he and the agent went to "Tommy" and picked up the one pound (165 a) which was contained in a Marlboro cigarette carton. He further testified that he and the agent went to the East Broadway apartment to get the goods. When asked to get what goods, he answered "We delivered the parcel of the pound and a half and also opened the package from Tommy. (167 a) The pound and a half came from Lam."

In an attempt to clarify what heroin came from whom, OR testified that he gave the agents two pounds-- a half ~~of~~ a pound from Tommy's pound and a pound and a half from Lam's lot (168 a); and the remaining pound he sold to a Caucasian; and he kept a half a pound for his own use. (169 a).

OR then went on to testify that he saw Lam again later that night; and Lam informed him that a mistake had been made and that the package contained three pounds instead of a pound and a half. OR denied any knowledge about the weight of the package and agreed to attempt to trace the goods. (170 a) Soon thereafter, OR was arrested as a result of the two sales he had made to the informer and the undercover police officer.

OR testified that two weeks prior to the trial, he identified the defendant from a single photo shown to him as the person he knew to be Wing Chong. He further stated that at that time (two weeks prior) he informed the authorities for the first time about the three transactions which took place in the Bronx. (229 a)

JOHN TOAL, a Special Agent for the Federal Drug Enforcement Administration, testified that on November 19, 1974, he arrested Ng; and that at the time of

the arrest, he seized a bank book and a telephone book from Ng's person.

He identified certain telephone numbers contained in the book taken from Ng: Number 571-0545 being the telephone number of the Hong Gong Restaurant; Number 878-0460 being the number of Better Service Laundry at 1505 Innwood Avenue in the Bronx; and Number 226-8528 being the number of the Vikings Club at 179 Canal Street.

He further testified that he made a Xerox Copy of the bank book taken from the defendant which was then offered by the Government as Exhibit 7 for evidence.

This exhibit was not admitted in evidence by the Court. Toal then testified that in March, 1974, he picked up the witness Danny OR and drove him to the Bronx to point out the laundry about which he (OR) testified. Toal gave the name of the laundry as being the Better Service Laundry (241 a) and the address being 1504 Innwood Avenue.

The Government next called KOCK MEN HOM as a witness. Mr. Hom testified that he was familiar with the Vikings Club in Chinatown which was located at 179 Canal Street, and that the Chinese name for the club was Won Fung.

He further testified that he frequented the club for three or four years and that he recognized the defendant as being from the Vikings Club; and that he sometimes would see the defendant there "on Sundays, sometimes during the day; other days he would be there in the evening."

RAPHAEL JULIAN RODRIQUEZ testified that he was a New York City Police Officer working in an undercover capacity during December, 1972, using the name of Carlo. On December 18, 1972, he spoke to an individual named "Baby" at his apartment at 160 East 2nd Street, and requested that "Baby" make arrangements for him to purchase a pound of brown rock heroin for \$15,000. (251 a)

"Baby" told Rodriquez to return later that evening and that the Chinaman (Danny OR) would have the pound ready. When Rodriquez returned to "Baby's" apartment, he met a female named Anna Ortiz who was to purchase a half a pound from OR as well. Danny OR and "Baby" provided Rodriquez with a pound of heroin which he delivered to the Police Crime Laboratory.

Through Rodriquez the heroin was then introduced by the Government as Exhibit No. 10, as the heroin

which Rodriquez purchased on the morning of December 19
(256 a).

Rodriquez then testified as to a second transaction with Danny OR taking place on December 28, 1972. This transaction was for two pounds. The heroin received from Rodriquez came in two separate lots both of which were given to him by Danny OR. The purchase price for the two pounds was \$29,000. Half a pound came from one source and a pound and a half came from another. These two pounds were introduced against the defendant as Government's Exhibit No. 11.

THE APPELLANT'S CASE

The defense called two character witnesses CHENG HING and Mrs. LEW MEE NGOR who both testified that the defendant's reputation within the China-town community was excellent

The defendant, SUEY WING NG, testified on his own behalf. He stated that he came to the United States in 1960, that he was 49 years old, and that he was married and had four children. He testified that soon after his arrival in New York City he went to work at the Better Service Laundry factory located in the Bronx where he worked for over four years. He became an American citizen in August, 1973. He opened his own business at 85 Bayard Street, Manhattan. His store was a grocery and laundry shop and he was doing business under the name of Wing Chong.

Ng frequented the Viking Volleyball Club about once or twice a week for a social gathering and to look for friends to play Mah Jong. He testified that he never saw Lam Ping at that club.

He identified his telephone address book (Government's Exhibit 6-A) and stated that he had the number of the

Viking Volleyball Club in the boo' and that he would call that number to find out whether his friends were up there. He further identified the telephone number of the Hong Gong Restaurant and indicated that a friend of his worked at the restaurant. His connection with the Better Service Laundry was that he sends his laundry wash up there to be done and that they delivered it to his store on Bayard Street.

Ng denied the testimony of both Lam and OR. Ng testified that the testimony of Lam Kin Sang was motivated by his refusal to lend Sang money; that both Lam and Danny OR falsely accused him in order to obtain reduced sentences.

Ng denies he ever went to Lam's gambling house; he denies he engaged in any narcotics transactions with Lam or that he ever placed or caused to be placed any heroin or package on the third floor landing of the Volleyball Club at 179 Canal Street.

Ng denies that he ever knew Danny OR. He knew Ah Sai because Ah Sai patronized his laundry shop. Ng denied that he ever rode in any car with OR and Ah Sai to the Bronx. Ng denied that he ever had any heroin transactions

with either of these witnesses.

As to the deposit in his bank accounts, Ng testified that they were the result of borrowing from persons because he intended to expand his business and that part of the money belonged to his children.

Ng further testified that there was a period of 45 - 50 days during 1972 that he was out of New York State and living with relatives in Virginia.

ARGUMENT

POINT ONE

GOVERNMENTS FAILURE TO GIVE THE
DEFENDANT NOTICE OF THE INTRODUCTION
OF CRIMES NOT CHARGED IN THE INDICTMENT,
UNDER THE CIRCUMSTANCES OF THE CASE,
SURPRISED THE DEFENDANT AND PREJUDICED
HIM TO THE EXTENT THAT THERE WAS A VIOLATION
OF DUE PROCESS AND A DENIAL OF A FAIR TRIAL.

The appellant submits that he was not afforded a fair trial on indictment 75 CR 173 wherein he was convicted of the crime of Conspiracy to violate Secs. 812 (a) (1) and 841 (b) (1) (a) of Title 21 United States Code. Evidence of crimes not charged in the indictment was "sprung" upon the appellant without prior notice in manner grossly violative of the appellant's substantial right to be definitely informed of the charges against him to enable him to present his defense.

The government's attorney was permitted to place trial strategy and gamesmanship ahead of fundamental fairness; and thereby denied the appellant adequate opportunity to meet the charges against him. The appellant firmly believes that notice of this evidence should have been afforded him in light of the special and confusing circumstances existent at his trial.

To substantiate this belief of confusion the appellant

calls the Court's attention to the following:

(a) The indictment upon which he was tried was of itself confusing; the introductory paragraph of Count One alone demands the highest order of concentration simply to identify the parties.

1. From on or about the 1st day of July, 1972, and continuously thereafter up to and including on or about April 1, 1973, in the Southern District of New York, SUEY WING NG, a/k/a "Ah Suey", the defendant and Lam Kin Sang, or Choi Sik, a/k/a "Danny Or", a/k/a "Ah Dau", Norman Low, a/k/a "Fatty Man", Chan Yuk Shui, Chan Yuk Wo, Mui Kai Foon a/k/a "Mong Wong", Lam Man Chung, a/k/a "Ja B Lam", Szeto Suey Nom, Keung Kam Shui, Lee Louie, a/k/a "Lee Yook Soon", Rafael Colon, a/k/a "Baby", Jose Milan, John Doe, a/k/a "Juan", and Jane Doe, a/k/a "Anna Ortiz, named herein as co-conspirators but not as defendants, etc. . . . (3a)

(b) The first four overt acts set forth in the indictment did not involve the defendant and no proof as to these acts was introduced.

(c) In pleading the overt acts of the alleged Conspiracy,

the government disguised its order of proof by deleting the overt acts of an entire transaction which was later testified to at the trial, i.e. the second Lam Kin Sang transaction with Ah Dau.

(d) The appellant was identified in the indictment by the name of Suey Wing Ng, a/k/a Ah Suey. The other crimes evidence was introduced against him under yet a third name, that of Wing Chong.

(e) Ninety percent of the testimony introduced at the trial was given in Chinese through the aid of a court interpreter.

(f) Several different transactions with numerous different individuals all having two or three Chinese names or aliases were testified to be the government's witnesses. Throughout the trial, the record reflects a confusion existing in the mind of the defense attorney. At different stages of the government's proof, it was all but impossible to determine what transaction, and with which individuals the witnesses were referring to as they testified.

The indictment charged the defendant with six substantive counts of possession and distributing a Schedule I narcotic drug; and the opening remarks of the government's attorney were addressed solely to the crimes charged in

the indictment. Counsel for the defendant, based on the notice he had received, could reasonably expect that the proof offered would be only as to those charges set forth in the indictment. Nowhere was the defendant on notice that proof of uncharged crimes would be introduced against him.

The government was clearly in a position to serve notice in the three weeks prior to the trial^{when} the government became aware of such evidence. The opening remarks of the government's attorney when compared to the proof offered at the trial, leads to the inference that the government's attorney intentionally held back any mention of the proof of uncharged crimes in order to spring it on the defendant at the most opportune time. What buttresses the appellant's belief that trial strategy held precedence over fair notice is the manner in which the "other crimes" evidence came into the trial.

In the course of the trial, the government's attorney, without an offer of proof, simply began eliciting testimony from the witness, Danny Or, of three uncharged sales of heroin which allegedly took place in the Bronx. The appellant is of the firm belief that only the government's attorney was fully aware of what was taking place. No objection was raised by the defendant's trial counsel.

In fact, he was at a loss to realize what had taken place; and belatedly expressed his confusion by a request for a side bar conference. The record is absolutely silent as to any effort being made, either by the Court or by the government's attorney, to inform the defendant that proof of other crimes was before the jury.

That counsel for the defendant did not express surprise or object should not be a bar to the raising of this issue on appeal. Counsel's confusion throughout the trial is borne out by his continued misstatement of the facts in his questioning of the government's witnesses on cross examination.

A criminal trial should not be one where eleventh hour surprises are sprung upon an accused. Surprise trial strategy should be offensive to the Court and where an accused's liberty is at stake, gamesmanship is most certainly out of place. Standards for Discovery and Procedure Before Trial, ABA, Tentative Draft (May, 1969) p. 31.

The appellant is not aware of any rule which would require the prosecutor to reveal all of his evidence prior to trial. If anything, the weight of authority is against such a rule. United States v. Lebron, 222

F.2d 531, 535-36 (2 Cir.) cert. denied 350 U.S. 876 (1955),
United States v. Brevard, 27 F.R.D. 250 (S.D.N.Y., 1961),
United States v. Lieberman, 15 F.R.D. 278 (S.D.N.Y., 1953)

The appellant does not expect this Court to set down a rule so harsh that the hands of the prosecutor would be bound to the point of having no flexibility in proving his case. This is not what the appellant seeks.

Here, he argues that a fair notice rule for the introduction of other crimes evidence should be established in those instances where the proof is heavily relied on by the government in seeking its conviction.

That the government relied heavily on the proof by these uncharged crimes is clearly borne out by the record. A picture of the Better Service Laundry was introduced (140 a); evidence of the defendant's doing business under the name of Wing Chong was introduced (243 a); testimony as to the personal address book of the defendant was admitted containing the telephone number of the Better Service Laundry (235 a, 236 a); the witness John Toal testified as to the route taken by him and Danny Or to locate the Better Service Laundry (241 a); and finally the government's attorney in his summation repeatedly referred to the Bronx transactions as being persuasive evidence of the defendant's guilt. (328 a - 345 a)

There is authority for the proposition that when introducing evidence of other crimes, it would be a better practice for the government to use such evidence on rebuttal where the trial judge could accurately consider the degree of relevancy and potential harm such evidence might have. United States v. Jones, 476 F.2d 533, 537 (D.C. Cir. 1973), United States v. Adams, 385 F.2d 548, 551 (2 Cir, 1967); United States V. Byrd, 352 F.2d 570, 575 (2 Cir. 1965).

The language in these cases is instructional and gives guidance to prosecutors as to the future use of other crimes evidence. No mention is made of prior notice; but the rationale for notice would be the same, i.e. affording the trial judge the opportunity to weigh the revelancy of such testimony against the potential harm such testimony might have. The goal of considered judgment is best achieved by a requirement that prior notice be given the defendant. Thus, argument can be had from both sides to assist the court in arriving at an informed judgment when deciding the admissibility of such evidence.

In the instant trial, the record is silent on the issue of weighing the potential for prejudice against the probative value that this other crimes testimony would have when admitted. No cautionary or limiting instruction was given as to the weight such evidence should

receive when being considered by the jury. There was absolutely no statement protecting the defendant from the prejudice which attaches to the presence of other crimes testimony. Had notice been given, an effort could have been made to reduce the prejudicial harm that such testimony undoubtedly has.

Where the underlying facts supporting the charges specified in an indictment are by their very nature confusing and substantial due process problem of fair notice arises by a surprise introduction of new uncharged crimes into a trial. A person charged with criminal offenses has the right to assume that he will be tried for those offenses only and should be given an adequate opportunity to meet all the charges against him.

The notice function of an indictment mandated by the SIXTH Amendment of the United States Constitution, of Rule 7 (c) of the Federal Rules of Criminal Procedure and of United States v. Russell, 369 U.S. 749 (1962) is without meaning if fair notice can be so lightly treated and so easily discarded. The appellant had no notice that these uncharged crimes would be introduced and a fortiori could not have had ample opportunity to be prepared to meet these new allegations.

The right to have notice of the charges upon which

an accused will be tried is unquestionably a substantive, constitutional protection. U.S. v. Forinas, 299 F.Supp 852 (S.D.N.Y. 1969); U.S. v. Mooney, 417 F.2d 936 (8th Cir. 1969), Hallman v. U.S., 208 F.2d 825, 827 (D.C. Cir. 1953). Apart from the issue of being twice put in jeopardy the underlying purpose of this basic right is to afford the accused an adequate opportunity to meet the charges against him. Berger v. U.S., 295 U.S. 78 (1935), U.S. v. Cruikshank, 92 U.S. 542, (1875), United States v. Hess, 124 U.S. 483. This right was most certainly not given the defendant in the trial below.

Due to the heavy reliance by the government on the proof of the three uncharged prior crimes, there exists the strong likelihood that it was this evidence which contributed substantially to the appellant's conviction. The appellant herein calls upon the doctrine of "Plain Error" Rule 52 of Federal Rules of Criminal Procedure; and requests this court to take notice that his substantial rights were indeed affected by the government's failure to afford him the opportunity to effectively meet the new allegations which were suddenly introduced in the trial.

One can not safely say that the jury's verdict was not heavily swayed by the evidence of the three Bronx transactions. Had the defendant been afforded notice

he would have been more effectively prepared to meet those new allegations. The substantial right of being afforded the opportunity to meet the charges against the defendant was denied by the government's action.

POINT TWO

THE APPELLANT'S RIGHT TO A FAIR TRIAL
WAS PREJUDICED BY THE ALLOWANCE OF PROOF
OF PRIOR ACTS ATTRIBUTED TO THE APPELLANT,
SUCH ACTS OR CRIMES NOT BEING CHARGED
IN THE INDICTMENT.

Evidence of other criminal offenses is admissible only if it is relevant for some purpose other than merely to show a defendant's criminal character and then only if its potential for prejudicing the defendant does not outweigh its probative value. U.S. v. Deaton, 381 F.2d 114, 117 (2 Cir. 1967); United States v. Bozza, 365 F.2d 206, 213 (2nd Cir. 1966). This is clearly the Second Circuit rule on other crimes evidence. If there is a need to provide necessary background material so that the jury doesn't have a truncated version of the facts then prior crimes evidence may well be admitted. See: Bozza. Or if intent is at issue then there exists a good argument for its admission. See: Deaton

That such evidence was introduced against the defendant can not be disputed. The defendant was charged in six substantive counts with possessing and distributing a narcotic drug. At his trial, the government introduced evidence of three additional

prior crimes not noticed in the indictment. The task now is to determine whether the proof of uncharged crimes was relevant for some purpose other than merely to show that the defendant was of bad character; and because of this, was likely to have committed the crimes charged in the indictment.

An examination of the facts supporting the three uncharged transactions in the Bronx does not lead to the conclusion that they were so peculiarly similar to the allegations alleged in the indictment that they constituted a pattern of conduct on the part of the defendant. The pattern of conduct attributed to the defendant in these uncharged transactions was one totally inconsistent with the conduct alleged by the government in all the other transactions purportedly involving the defendant. If anything, the record reveals that these three Bronx transactions were a radical departure from the stated modus operandi of the defendant. Much more is required to show a pattern of conduct than the mere repetition of crimes of the same class, the pattern must be so unusual and distinctive as to be like a signature. McCormick Evidence § 157 (1954); U.S. v. Cavallino, 498 F.2d 1200 (CA Fla 1974).

An examination of the closing remarks of the prosecutor reveals the true purpose for which this evidence was introduced. On several occasions the government's attorney repeatedly referred to the defendant in a contemptuous and disparaging manner. All of these comments were deliberate attacks at the defendant's character designed to bring home to the Jury the belief that as a man of bad character the defendant was likely to have committed the crimes charged in the indictment.

"The evidence from the government's witnesses clearly shows that Ah Suey or Wing Chong or Suey Wing Ng or whatever name he happens to be going by,"

(337 a)

"Well, as Mr. O'Rourke said to you, use your common sense. People who deal in heroin, who do they deal with? Are you going to go to the local policeman? Are you going to go to your local clergyman and deal in heroin with your local clergyman? Are you going to do to a businessman and deal with the businessman? Of course not. You deal with people like Danny Or and Lan Kin Sang who deal in heroin and when a person like

Ah Suey chooses to deal with those people" (338 a)

"When you are a person like Ah Suey supplying heroin" (338 a)

"The issue in this trial isn't whether Danny Or and Lam Kin Sang are bad people. We know they are bad people. . . . Sure they are bad people and they have been punished. The issue in this trial is whether or not the interests of justice are going to be satisfied with respect to Ah Suey." (339 a)

The appellant is aware that a charge of Conspiracy to commit criminal acts usually requires proof of a course of conduct to establish the existence of the corrupt agreement.

While this is true, to introduce evidence of prior crimes there should at least be a peculiar similarity between the conduct sought to be proved and the acts constituting the prior crimes.

In the instant case, there was no logical nexus between the Bronx acts and those charged in the indictment which would mandate their introduction into evidence under a theory that they established a pattern of conduct on the part of the defendant and his co-actors. The Bronx acts didn't serve to

provide necessary background material as in U.S. v. Bozza, nor did they contribute one iota to the establishing of the defendant's intent as in U.S. v. Deaton.

The appellant submits that the proof of these acts did not contribute relevant information to the jury necessary to support the crimes charged in the indictment. The proof of these acts was introduced to prejudice the jury into a belief that the defendant was of equally bad character as the witness and that because of this he was likely to have committed the crimes alleged in the indictment.

Where the court permits acts of prior but not necessarily similar occurrences, especially when they involve trafficking in narcotics which is repulsive to the average juror, the prejudice in fairly judging the crime charged in the indictment is so overwhelming that the jury could not render a fair appraisal of the facts relating to the count on which the defendant was convicted; and prematurely obviates any defense. This is particularly true where the defense was a denial that Ng engaged in the same corrupt activities that the

Government's witnesses did.

The Court should give serious thought to clarifying and limiting the risk of evidence, permitting the introduction of similiar acts, as being contrary to the United States Constitution which holds that no person can be held for an infamous crime or a grand jury unless a Grand Jury indicts.

Exceptions to the general rule about not admitting uncharged crimes into evidence, cannot be mechanically applied. One must take a realistic and balanced approach to the issue. One must balance the prejudicial impact on the Jury of permitting evidence of appellant's character (in advance of defendant taking the witness stand) as against the limited use of such evidence under exceptions.

The showing of narcotic dealings not charged will turn the Jury away from any possibility of seeing the defendant in a credible light and throws him in with confessed pushers and dealers (See People v. Fiore, 34 N.Y.2d 81).

The Court below failed to caution the jury that proof of uncharged crimes is not to be considered as proof of appellant's bad character. It was plain

error for the court not to have done so. U.S.
v. McClain, 440 F.2d 241 (CADC-1971)

POINT THREE

THE DEFENDANT'S RIGHT TO A FAIR TRIAL
WAS SUBSTANTIALLY PREJUDICED BY THE
IMPROPER CONDUCT OF THE GOVERNMENT'S
ATTORNEY THROUGHOUT THE TRIAL.

As previously noted by Point One of the appellant's brief, surprise trial tactics and strategy gave way to fundamental fairness in the conduct of the government's attorney. The opening remarks were not only misleading as to the government's proof, but also served as a guide to the future course of conduct that would be followed through the remainder of the trial. A zeal to prosecute should not be such that it outruns the prosecutor's duty and obligation of fundamental fairness owed to the accused. Berger v. U.S. 295 U.S. 78, 88 (1935); Handford v. U.S. 249 F.2d 295, 296 (5 Cir. 1957). The appellant is of the firm belief that such substantial misconduct occurred during his trial that his right to a fair trial was thereby effectively denied him.

On two occasions in the trial, bank records of the defendant were offered into evidence by the government's attorney (237 a, 302 a). Each offer was made in the presence of the jury; and on each occasion the offer was objected to and was rejected by the Court. The government was permitted to read verbatim from exhibits

not in evidence in forming its questions on the subject matter contained therein (303 a-307 a). The appellant submits that this conduct was error prejudicial to the defendant and had a substantial impact on the jury as shown by their request for the bank book during their deliberations. That there was testimony in the record regarding the defendant's finances does not cure the fact that such was brought about by the improper use of items not in evidence in the first instance.

The government's attorney throughout his closing remarks made repeated statements to facts not in evidence and used persuasion as a substitute for evidence. The government should not be allowed to establish the guilt of an accused by remarks which have no foundation in the evidence. The government's attorney should confine himself to the facts disclosed by the evidence; and may not state facts of his own knowledge which are not in evidence. U.S. v. Holt, 108 F.2d 365 (7 Cir. 1939); Dunn v. U.S., 307 F.2d 883 (5 Cir. 1962).

An examination of the summation of the government's attorney reveals numerous instances where he either misstated the facts which were testified to by the witnesses or he testified himself as to new facts. Listed below are examples of such conduct:

- (a) There was testimony given by the wit-

ness Lam Kin Sang that he sold heroin to the Chan brothers at a price of \$11,500 (35 a). In summation the government's attorney stated that Lam didn't make a penny on that deal "because he was doing it as a favor to the Chan brothers" (330 a). There is no testimony whatsoever to that effect by the witness. Statements of the government's attorney at a later stage in his summation gives clear reason why such a claim was made where he states: "As the heroin proceeds through the pipeline, every person who gets his hands on it jacks up the price a little bit so they can get their cut of the action." (331 a) It had to be so stated by the government because a no profit transaction didn't fit within the theory of the government's case.

(b) The appellant's attorney made mention that the Chan brothers were not called to testify. The government's attorney could quite properly answer this claim to defeat the implications to be drawn by the remarks of counsel. This claim was answered in a twofold manner by the government (330 a). Answer Number One was a proper inference to be drawn from the evidence and certainly within bounds.

Answer Number Two was of a different nature altogether and was highly improper and prejudicial to the defendant. "Number two, if we could have the Chan brothers here, they wouldn't be here as witnesses, they would be subject to prosecution themselves and there is no reason to believe they would be willing Government witnesses." (331 a)

Here the government's attorney is testifying and informing the jury of a fact not before them, i.e. the implied flight to avoid prosecution by both individuals.

(c) A major issue in this case was the source of monies deposited in various bank accounts owned by the defendant. In answer to questions on cross examination, the defen-

dant gave his explanation as to the source of the funds for the various deposits. During summation the government's attorney improperly stated that there was "no explanation" as to the source of said funds (333 a). "The explanation is because that represents the profits that he made on his sales of heroin and anytime he sold the heroin he made \$2,000 here or \$3,000 there, depending on how much he had to pay for it." (334 a) The government substituted its explanation in spite of the fact that it had been previously cautioned by the Court about unfounded inferences when this evidence was first offered (238 a, 239 a).

(d) There was a flagrant misstatement of the evidence when the government's attorney refused to the last transaction with Lee Louie where the package was short weighted. "... after that, Louie told him he was short and he wanted his money back. And Lam called Ah Suey and Ah Suey admitted it. He said, 'Yes I knew it was a pound and a half short.'" (335 a)

A review of the evidence on this point reveals that there was never any such statement attributed to the defendant (79 a). This by itself might appear insignificant but when taken in context of the next comment the effect unquestionably was both misleading and grossly prejudicial. "Do you think Ah Suey was trying to do that to try to recoup his losses for the pound and a half he lost when he made the mistake in the Danny Or transactions?" (335 a)

(e) The government raised the issue about both Lam Kin Sang and Danny Or being self-admitted participants "in this whole heroin trafficking scheme"; and that the Government told the jury about them in the Government's opening statement. (337 a) This is patently untrue, nowhere was Danny Or ever mentioned in the government's opening remarks. (13a-16a).

(f) The government's attorney attributed to the witness Danny Or statements never made by him. The claim was made that Danny Or

testified that in his dealings with Lam Kin Sang that he never saw Wing Chong and that he didn't know Wing Chong was the source of that heroin (344 a). There is no testimony anywhere in the record of reflecting such a statement.

The appellant maintains that the remarks of the government's attorney went beyond the evidence and were not within the bounds of fair comment. Of particular harm to the defendant is the fact that inferences were not only urged on points upon which there was no evidence (e.g. the Chan brothers supposed flight to avoid prosecution); but were also urged upon facts which were grossly misstated.

The erroneous claim that the defendant stated in the short weighted sale: "Yes, I knew it was a pound and a half short," (335 a) is given to support the inference that the defendant was trying to recoup a loss from a prior sale. That the argument is built on a complete misstatement of the evidence presents the serious problem of prejudice to the defendant because it is deceptively logical and attractive.

These repeated misstatements of the evidence were not minor or inconsequential. The bank books; the theory of stepped up prices in a distribution pipeline; and a claim of recovering losses for the mistaken weight in the sale to Danny Or were central to the government's argument.

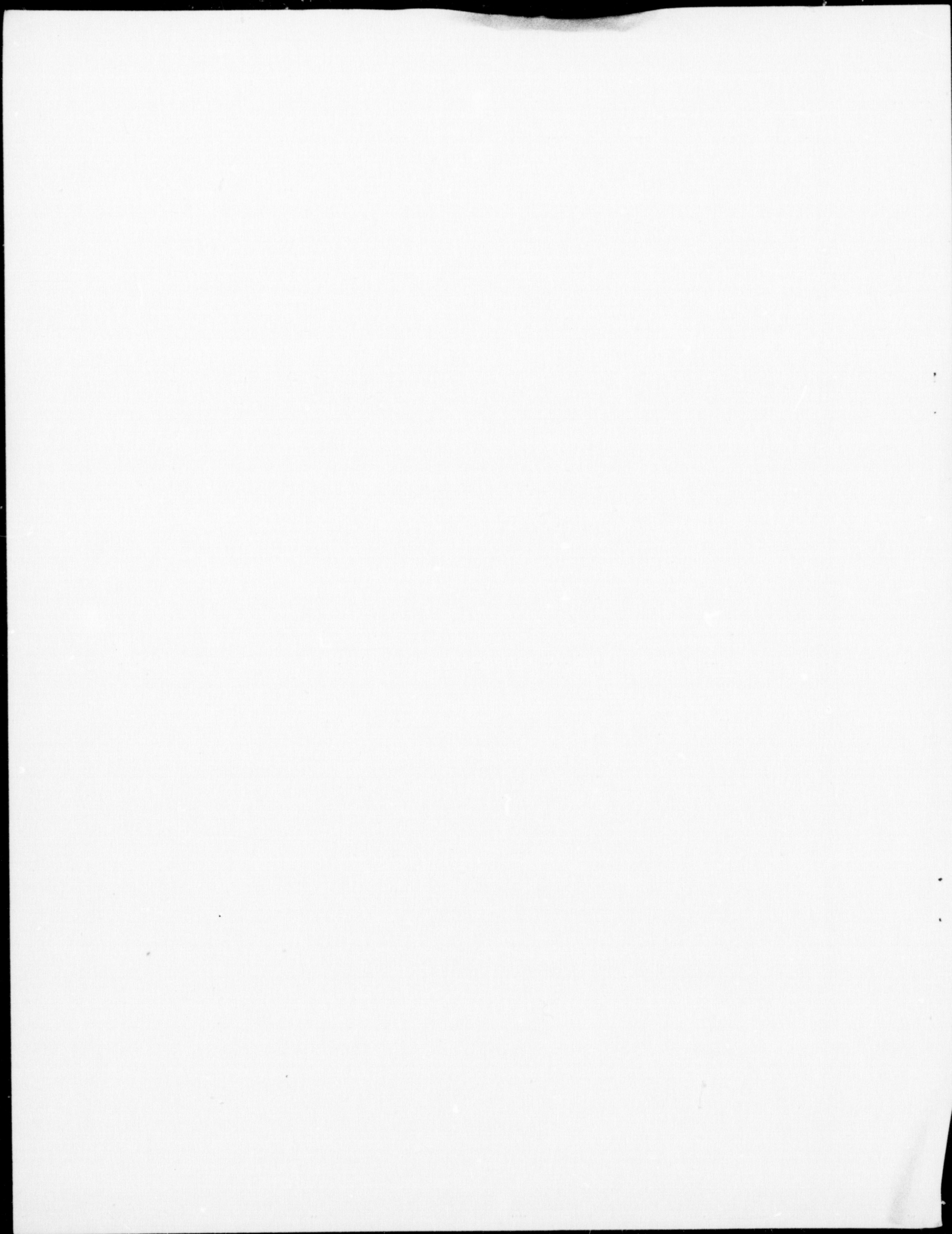
The evidence in the government's case against the defendant was far from overwhelming and persuasion containing built on misstatements of the evidence could well have made the difference between acquittal or conviction of the defendant.

Conclusion

The judgment should be reversed and
a new trial ordered.

Respectfully submitted,

Perrotta and Patten
Attorneys for Defendant-Appellant
80 Broad Street
New York, New York 10004



UNITED STATES COURT OF APPEALS
for the Second Circuit

UNITED STATES OF AMERICA.,

Appellee,

- against -

SUEY WING NG,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

ss.:

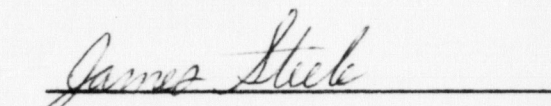
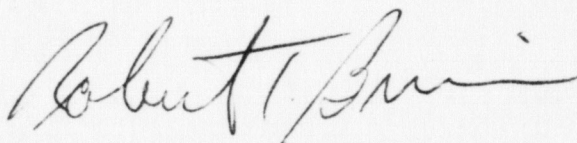
I, James Steele, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th, Street, New York, New York
That on the 19th day of May 19 75 at 1 St. Andrews Place, N.Y. N.Y.

deponent served the annexed *Summons* upon

Paul Curran, U.S. Attorney-Eastern District

the Attorney in this action by delivering ²⁵ a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 19th
day of May 19 75


JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977